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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. 169

UNITED STATES TRUST COMPANY OF NEW YORK,
TRUSTEE UNDER DEED OF TRUST OF JOHN P. WILSON,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS OF THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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COMMISSIONER OF INTERNAL REVENUE,
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PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of United States Trust Company of New York, as Trustee under Deed of Trust of John P. Wilson, respectfully shows to this Honorable Court:

A. Summary Statement of the Matter Involved.

This case involves a proposed assessment of a deficiency in income taxes for the years 1924 to 1929, inclusive.

The taxpayer is United States Trust Company of New York, as Trustee under Deed of Trust of John P. Wilson, as amended. The taxpayer reported all income accumulated by it as having been accumulated in three separate trusts and paid the taxes on that basis. The Commissioner claimed that there was but one trust and assessed the alleged deficiency accordingly.

By the stipulation filed in the Board of Tax Appeals

the controversy is limited to a single issue, namely, is there one trust or are there three trusts? (R. 122.)

The original trust was created in March, 1913, by John P. Wilson for his three children. (R. 65, 133.) It was a single trust. Pursuant to the express power reserved in the original instrument to amend it in any respect (R. 76) it was four times amended, namely in 1918 (R. 79-81), in 1919 (R. 82-85), in 1920 (R. 86-89), and in 1928 (R. 133-136).

It is the position of the taxpayer that the amendments divided the original trust into three trusts, one for each of the three children of the grantor, and that the accumulations are properly divided between these three trusts and properly taxed to them. This is denied by the Commissioner.

The Board of Tax Appeals reversed the Commissioner, holding with the taxpayer that there were three trusts. The opinion of the Board is not published but is printed in the record. (R. 95-105.) The case, although independently considered by the Board, was decided on the authority of *William B. McIlvaine and John P. Wilson, Jr., Trustees under Deed of Trust of John P. Wilson,* v. *Commissioner of Internal Revenue,* 29 B. T. A. 304, (See R. 104-105) from which case it is indistinguishable. The latter case was appealed by the Commissioner to the United States Circuit Court of Appeals of the Seventh Circuit, where it is still pending.

The instant case was appealed by the Commissioner to the United States Circuit Court of Appeals of the Second Circuit. That Court reversed the Board of Tax Appeals. The Board had found the intention to create three trusts clearly expressed, and gave effect to that expressed intention. The Circuit Court of Appeals held that "* * * what was actually done, rather than the purpose of the parties must control" (75 Fed. (2d) 973 at 976). And what was

done was found to have made the intention to create three trusts inoperative solely because the Trustee, after the amendments, did not physically separate the corpus of the estate into three parts, but allowed the investment to remain *in solido* assigning undivided interests in the corpus to the accounts set up for the separate trusts. The Court decided that the amendments to the trust instrument were ineffective to create separate trusts because undivided interests in a single identifiable fund were held to be too indefinite to constitute the corpus of separate trusts.

B. Reasons Relied on for the Allowance of the Writ.

The amendments to the original instrument clearly set forth the unquestioned intention of the parties to create separate trusts. (See accompanying brief, P. 9-10, and R. 79-89, 133.)

It has been admitted throughout the proceedings that all of the amendments were validly adopted pursuant to the power reserved in the original instrument.

No authority has been cited, and we have found none, which would justify a decision against the taxpayer merely because the parties sought to accomplish their purpose by amendments to the original instrument rather than by a termination of the old trust and a distribution of the assets, followed by new agreements and new assignments. The Board of Tax Appeals, in the companion case of *McIlvaine, et al., Trustees under Deed of Trust of John P. Wilson* v. *Commissioner*, 29 B. T. A. 304, at page 311, definitely held that the creation of the separate trusts by amendments was proper. The Circuit Court of Appeals did not question the propriety of proceeding by amendment, but held that the purpose of the parties had not been fulfilled because the Trustee had made no physical division of the property between the several trusts.

An administrative practice of the Trustee cannot change the fundamental characteristics of these trusts. If the Trustee failed to carry out the directions contained in the amendments it could by proper proceedings have been forced to conform its administrative practice to those directions. The record here, however, shows that the Trustee did everything it was supposed to have done and did everything necessary to divide the old trust into three separate trusts. In the opinion of the Court, however, the assignment of undivided interests to each of the three trusts instead of the physical division of the funds between them, alone kept this a single trust and defeated the purpose of the parties to create three trusts.

The Court held that "the amendments were ineffective to create separate and independent trusts for each of the beneficiaries (R. 277-278)"—not because the intention was not clearly expressed in the amendments, but—"for lack of a definite and separate corpus." (R. 278.)

In so holding the Court went directly in the face of all authority and universal practice, which recognizes that an undivided interest may properly constitute the corpus of a trust estate. The Court relied particularly on the case of *Snyder* v. *Snyder,* 280 Ill. 467 (117 N. E. 465). That case does not support in the slightest degree the doctrine that undivided interests in a single fund are not definite enough to form the corpus of separate trusts. On the contrary the Illinois courts have held in the broadest language possible that *any* property interest whatever, whether legal or equitable, may be the trust *res.*

Burke v. *Burke,* 259 Ill. 262, at 268 (102 N. E. 293, at 295).

Gurnett v. *Mutual Life Ins. Co.,* 356 Ill. 612, at 617 (191 N. E. 250, at 252).

And this is the law generally.

Perry on Trusts, 7th Ed. Vol. 1, Sec. 67.

It is specifically the rule, without exception in any authority, that an undivided fractional interest in any property may constitute the corpus of a trust.

Section 73—Am. Law Institute—Tentative Draft No. 1—Restatement of Law of Trusts.

Bogert, Trusts and Trustees, (1935) Vol. 1, Sec. III, pp. 351 and 352.

In re Colgrove's Estate, 221 N. Y. 455 at 459 (117 N. E. 813 at 814).

Vanderpoel v. *Loew,* 112 N. Y. 167 at 180 (19 N. E. 481 at 484).

Bay Biscayne Co. v. *Baile,* 73 Fla. 1120, at 1150 (75 So. 860, at 869).

Rollestone v. *National Bank of Commerce,* 299 Mo. 57, at 71 (252 S. W. 394, at 398).

It has been stated by counsel for the Commissioner, and will doubtless be contended here, that the decision in the instant case rests entirely on the particular facts and involves no point of general public interest. This position is wholly untenable. The decision of the Circuit Court of Appeals is rendered, of course, on the facts presented, but it is based on a principle of wide public interest involving many trusts throughout the country and the application of the tax laws to them. The position of the Government has always been, (and the decision of the Circuit Court of Appeals is) that there was no effective division into three trusts, because there was no physical division of the trust *res* but merely an assignment to each trust of an undivided interest. This conclusion is based in turn on the erroneous doctrine laid down by the Court that the amendments were ineffective to create separate trusts because undivided interests are too indefinite to form the corpus of separate trusts. There is no other ground stated by the Court or which can be found to justify its decision. Such a decision is directly in conflict with

rules of law having general and specific application to the facts here involved. Furthermore, it is in conflict with the known practice of trustees throughout the country, to which the Supreme Court need not close its eyes. Precisely the same question passed on in the instant case is now pending before the Circuit Court of Appeals of the Seventh Circuit in the case already referred to. The question involved is one of great public and general interest. If the decision stands it will mean confusion in the administration of every trust in the land in which the corpus of the estate is an undivided interest in real or personal property.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that court to certify and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 199, *Commissioner of Internal Revenue, petitioner,* v. *United States Trust Company of New York, Trustee under Deed of Trust of John P. Wilson, respondent,* and that the said judgment of the Circuit Court of Appeals of the Second Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

UNITED STATES TRUST COMPANY OF NEW YORK,
Trustee under Deed of Trust of John P. Wilson,
By CLAY JUDSON,
Counsel for Petitioner.

WILSON & MCILVAINE,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1934.

No. .....

UNITED STATES TRUST COMPANY OF NEW YORK,
TRUSTEE UNDER DEED OF TRUST OF JOHN P. WILSON,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF THE BOARD OF TAX APPEALS AND CIRCUIT COURT OF APPEALS OF THE SECOND CIRCUIT.

The opinion of the Board of Tax Appeals is not officially published but is printed in the record of this case. (R. 95-105.) [The case, although independently considered by the Board was decided on the authority of a companion case, *William B. McIlvaine and John P. Wilson, Jr., Trustees under Deed of Trust of John P. Wilson,* v. *Commissioner of Internal Revenue,* 29 B. T. A. 304. (See R. 104-105.) The latter case is now pending on appeal by the

Commissioner of Internal Revenue to the Circuit Court of Appeals of the Seventh Circuit.]

Opinion of Circuit Court of Appeals of Second Circuit 75 F. (2d) 973.

II.

JURISDICTION.

The jurisdiction of this Court to grant this petition for writ of certiorari is based upon Section 240 of the Judicial Code as amended (Title 28, U. S. C. A., Sec. 347), and paragraph 8 of the Act of February 13, 1925 (Title 28, U. S. C. A., Sec. 350). The judgment of the Circuit Court of Appeals of the Second Circuit, of which review is sought, was entered March 11, 1935. (R. 278.) Petition for rehearing duly filed by petitioner (respondent below) was denied on March 27, 1935. (R. 279.)

III.

STATEMENT OF THE CASE.

The facts are disclosed in the record, in the opinion of the Board of Tax Appeals (R. 95-105), and in the opinion of the Circuit Court of Appeals of the Second Circuit (75 F. (2d) 973).

The sole question before the Court is whether the Circuit Court of Appeals of the Second Circuit, in reversing the Board of Tax Appeals and in finding that the amendments to the trust deed of John P. Wilson failed to create three trusts, erroneously laid down a rule which is contrary to authority and to principles of law on which the practice of trustees and settlors throughout this country has been based.

On March 12, 1913, John P. Wilson established a trust

for his three children. (R. 65-77.) The trust deed provided that any of its provisions "may be altered, changed or modified in any respect and to any extent at any time by an instrument in writing signed by the three beneficiaries * * * provided, however, that such instrument must be approved in writing" by the grantor if living. (R. 76.) Pursuant to the authority reserved in the original instrument the provisions of the trust instrument were four times changed.

The first amendment was adopted under date of September 21, 1918. (R. 79-81.) It directed that the trust estate "be divided into three separate and equal parts or shares (to which may be assigned undivided interests in the whole or any part of the said trust estate), which parts or shares shall severally be designated" by the respective names of the three beneficiaries. It was also provided by the first amendment that, during the life of the grantor, a part of the net income received from each share should "be accumulated and added to the principal of such share." This provision with reference to income, however, was superseded first by the provision relating thereto in the second amendment and finally by the provision relating to income contained in the third amendment.

The second amendment was adopted under date of June 19, 1919. (R. 82-85.) It provided that "one-half (½) of the net income of each of the three trust estates" should be paid over as received to the beneficiaries entitled to share therein, and the other half should be paid over in accordance with the requests made to the Trustee. It was further provided that the "net income from each of said trusts not paid over" should be "added to the principal of the trust fund from which" it was derived; and that "the several trust estates held in trust" should upon termination of the trusts be paid over to the respective beneficiaries.

The third amendment was adopted under date of December 1, 1920. (R. 86-89.) It superseded the portions of the prior amendments relating to the payment of income. It directed the Trustee to "pay out as much of the income from each of said separate trusts" as it was directed to pay by a majority of the beneficiaries "of all said trusts," with the proviso that "equal payments must be made out of the net income from each of said separate trusts, to the end that said several separate trusts may be maintained on a basis of equality," so far as practicable. This amendment further provided that "so much of the net income received in any year from each separate trust estate" as was not paid out was to be added to the principal "of the separate trust estate from which it was derived"; and so much of the net income "of said trusts" as the Trustee was directed to pay out for charitable uses was to be paid out in equal amounts "from each of said separate trusts."

The fourth amendment was adopted under date of April 25, 1928. (R. 132, and 133-136.) It enlarged the powers of the Trustee with respect to borrowing money, providing in part as follows (R. 135):

> "All sums at any time borrowed in pursuance of this authority shall be and be dealt with as part of the principal of the three trusts hereunder in equal shares in the same manner and to the same extent as any other cash constituting part of the principal of said trust estates."

Prior to the amendment of September 21, 1918, the Trustee kept one account under the heading "Trust under Deed of John P. Wilson for John P. Wilson, Jr., and others." All of the income as collected was credited to this account. (R. 144.) Aside from cash, the property at all times consisted chiefly of corporate stocks with a few government and municipal bonds. (R. 138.) Immediately after the amendment of September 21, 1918,

there was a change in the method of keeping the accounts. At that time three accounts were opened, one in the name of "Trust under Deed of John P. Wilson for John P. Wilson, Jr.", one in the name of "Trust under Deed of John P. Wilson for Anna W. Dickinson," and one in the name of "Trust under Deed of John P. Wilson for Martha Wilson," and thereafter each of the separate accounts was credited with its income only. At the same time on the records of the Trustee an actual division was made of its property account into three separate accounts of property held showing the exact number of shares and bonds in each trust. (R. 145.) The Trustee filed separate income tax returns in each year for each of the three trusts and paid all taxes shown to be due upon the accumulations of income in each trust separately. (R. 141-144; Exhibits 4-39, 164-226.) Exhibits 40 and 41 (R. 227-229) are photostatic copies of the pages of the old account as it was kept prior to the amendment of September 21, 1918. These exhibits show that prior to that time the account was treated as a single unit but that on September 27, 1918, the balance of principal and income was divided into three parts on the books, and one part was assigned to each of the three separate trusts then set up, namely the trust for John P. Wilson, Jr., the trust for Martha Wilson, and the trust for Anna W. Dickinson. Exhibits 42, 43, and 44 (R. 147-149; 230-236) are photostatic copies of ledger pages from the books of the Trustee and show the three new accounts opened after the first amendment to the trust indenture. These show that an undivided one-third interest in each of the items shown on the earlier single account was assigned to each one of the new trust accounts. All transactions were thereafter separately accounted for in each of the three separate trusts. (R. 151.)

Although there was no physical separation of the stock certificates the interest represented by them was appor-

tioned on the vault records of the Trustee between the three trusts. (R. 159-161.)

When dividends were received they were credited in equal amounts to the three trusts. (R. 161.) Whenever the stock was held in the name of a nominee it might be applicable not merely to the Wilson trusts but to other trusts held by the Trustee as well. (R. 161.)

All of the cash held by the Trust Company for all of its trust estates (including the three Wilson trusts) was kept in one bank deposit. In this respect the Wilson trusts were treated exactly as all the other trusts managed by the United States Trust Company. (R. 164.)

A statement of the foregoing facts is also found in the opinion of the Board of Tax Appeals (R. 95-104), and in substance is also found in the opinion of the Circuit Court of Appeals of the Second Circuit. (75 Fed. (2d) 973.) The Court found:

> "* * * Prior to the amendment of September 28, [21] 1918, the trustee kept its accounts as a single trust for the three beneficiaries, but after that date the capital account of the trustee was divided into three equal parts, one assigned to each beneficiary. Separate accounts were thereafter kept. * * * There was never an actual division to each beneficiary, but a third interest in each item of property was assigned to the account of each beneficiary (p. 975).
>
> "* * * The trustee assigned, after the first amendment, to each child an undivided one-third interest in the aggregate estate; * * *." (p. 976.)

The foregoing statement by the Circuit Court of Appeals is substantially correct, except in so far as it refers to an assignment of undivided interests to "each beneficiary" or to "each child". The record cited above is perfectly plain that the assignment after the first amendment was of a one-third interest to each of the separate accounts of the three trusts set up for the three beneficiaries on the books of the Trustee.

The Court further found, page 976:

"• • • Acquired property after the first amendment, as well as before, was maintained in the aggregate, and only undivided interests were assigned to the respective accounts set up for the beneficiary. The income derived from all the trust property and each and every item thereof was assigned to the respective accounts, one-third to each account. While this was an allocation to the respective accounts in equal shares, it was held by the trustee in one fund deposited in a single account. The stocks were held in the name of the trustee, as under the original grant, or in the name of a nominee, and none were held by the trustee in its name separately for different beneficiaries. In making reinvestments, the trustee did not separate the funds for reinvestment into three accounts and invest for each account. It maintained one fund and invested on behalf of all the beneficiaries together."

• • • • •

IV.

SPECIFICATION OF ERRORS.

1.—The Circuit Court of Appeals erred in reversing the decision of the United States Board of Tax Appeals.

2.—The Circuit Court of Appeals erred in holding that the amendments to the original trust indenture do not create three trusts.

3.—The Circuit Court of Appeals erred in holding that the amendments "were ineffective to create separate and independent trusts for each of the beneficiaries • • • for lack of a definite and separate corpus"

4.—The Circuit Court of Appeals erred in holding that under the laws of the State of Illinois (or of any other state) the amendments were ineffective to create separate trusts for lack of a definite and separate corpus.

5.—The Circuit Court of Appeals erred in taking from

the taxpayer a substantive property right existing under the laws of the State of Illinois.

6.—The Circuit Court of Appeals erred in holding that an undivided interest in property is too indefinite to constitute the corpus of a separate trust estate.

V.

SUMMARY OF ARGUMENT.

The language in the amendments to the trust instrument indicates as plainly as language can an intention to create three trusts. The opinion of the Circuit Court of Appeals is directly opposed to the lawful and proper purpose of the parties and is based solely on the doctrine, finding no support in any authority, that a trust must fail for lack of a definite corpus if the interest held in trust is an undivided interest in a larger fund. No authority has been found in any jurisdiction to justify this decision. It is not the law in Illinois, and an opinion which so holds not only unjustly penalizes the taxpayer in this case in a very large amount, but causes confusion and uncertainty among trustees, settlors and beneficiaries throughout the country.

VI.

ARGUMENT.

THE AMENDMENTS TO THE TRUST INDENTURE CLEARLY EXPRESS THE INTENTION OF ALL THE PARTIES TO CREATE THREE SEPARATE TRUSTS. THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT THREE SEPARATE TRUSTS WERE NOT CREATED IS CONTRARY TO ALL AUTHORITY AND TO UNIVERSAL PRACTICE.

The validity of the amendments to this trust indenture as such has never been questioned. They were adopted in the manner and form required by the provisions of the

original trust indenture permitting the change or modification of that instrument in any respect whatsoever. The clearly expressed purpose of the amendments becomes even more manifest when they are read as a whole than is apparent from the reading of the excerpts contained in the statement of facts. The original grantor and the beneficiaries, who together were entitled to modify the original instrument, intended to modify that instrument so that after September 21, 1918, the Trustee should hold three trusts, one for each of the beneficiaries, and not one trust in which each had an interest. If there are three trusts the accumulations in each trust must be separately taxed at the rates applicable to each. If there is one trust the accumulations therein are taxed at a much higher rate. The parties cannot be criticized for dividing this single trust into three trusts though their main purpose may have been to save taxes. There is no rule which requires that of two ways equally available for accomplishing a given end, that one must be chosen which will be subject to the greater tax. On the contrary, as has been repeatedly reiterated by this Court

> "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes or altogether avoid them, by means which the law permits, cannot be doubted." *Gregory* v. *Helvering*, 293 U. S. 465, 469.

Nor is there any color of justification for requiring the Trustee of a fund held for one of these beneficiaries to pay a tax at a rate measured not by the income from that fund but by the income from that fund and two other funds combined. In effect that would be to tax one person on the income of another. See *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206 at 215, and *Knowlton* v. *Moore*, 178 U. S. 41 at 77.

If three trusts were created for the three children of the settlor in this case whatever advantages flow from that

fact are legitimate and proper. The fact that there are advantages can have no bearing whatever on the real question at issue, which is, were three trusts created?

Nor can it be that a mere matter of form in the establishment of the separate trusts, namely, their creation by *amendment* of the original instrument rather than by a new trust deed following a termination of the original trust, can possibly be held to affect the decision in this case.

This leaves but one matter for consideration, which is the ground on which the Circuit Court of Appeals based its decision, namely, the failure of the Trustee to physically divide the aggregate fund, and to assign specific shares of stock and specific dollars to each of the trusts. The only reason advanced by the Circuit Court of Appeals for its decision is that the purpose of the parties to create separate and independent trusts was ineffective because an undivided interest in a definite aggregate fund is too indefinite to form the corpus of a separate trust.

The language of the instruments state that these trusts were separate and distinct and the parties so treated them. If the Trustee had failed to carry out the directions contained in the instruments that failure could not have affected the legal relationships therein set forth. But the Trustee did not fail in this respect. It treated the trusts, as separate and distinct trusts, each with its own records and accounts. (R. 145.) It filed separate tax returns for each trust. (R. 141-142.) It treated the funds held in these three trusts exactly as it treated the funds held by it in the thousands of other trusts in which it acted as trustee. (R. 164.)

The Circuit Court of Appeals, however, took the position that what was done, namely, the assignment of undivided interests to the separate trusts rather than the physical division of the property between them, indicated some

other intention, and the court cited as authority the case of *United States* v. *Phellis*, 257 U. S. 156, at 172. In that case the Supreme Court said that what is actually done rather thar the purpose of the parties must control, although the court found that there was no difference in fact between the intention of the parties and what they actually did. Moreover, the question before the court was the validity of a tax assessed under the 1913 Revenue Act against an individual based on the receipt of 500 shares of stock of a Delaware corporation distributed to the taxpayer by a New Jersey corporation. The former corporation arose out of a reorganization of the latter, and the taxpayer argued that the two corporations were essentially identical and that the receipt of the stock in question therefore did not constitute realized income in his hands. As to the particular point involved the court said that in such matters what was done rather than the design and purpose of the participants should be the test, and the court found that the two corporations were not essentially identical. Whether two corporations organized under the laws of different states are essentially identically must depend upon what was actually accomplished rather than upon the intention of the parties. In such a case the intention of the participants may well be immaterial. In determining the character of a trust, however, the major factor involved is the intention of the parties as indicated by the language used in the instrument creating the trust. Those who drew the instruments in the instant case clearly expressed their intention. The trustee by no act of its own could change the character of the trust. Nor is there any single thing which was *done* in the instant case at variance with the plain intention of the parties expressed in the amendments.

The original trust instrument provided that it should be construed according to the laws of the State of Illinois. (R. 77.) And presumably each of the modifications thereafter

adopted is controlled by that provision. The Circuit Court of Appeals so held. At the conclusion of its opinion, in setting forth the basis of its decision the Court said, page 976:

> "* * * In the instant case, the deed provided that it should be construed according to the laws of the State of Illinois and, in view of what was said in *Snyder* v. *Snyder, supra* (280 Ill. 467, 469; 117 N. E. 465) the amendments were ineffective to create separate and independent trusts for each of the beneficiaries for lack of a definite and separate corpus."

The decision cited does not sustain the opinion of the Court in the slightest degree, either directly or inferentially. There is nothing in that opinion which can possibly be urged as authority for the doctrine that undivided interests in a single fund are too indefinite to form the corpus of separate trusts. In that case a bill was filed to establish an equitable interest in land under an alleged trust based on a statement in a guardian's report as follows, page 468:

> " 'She would further report that the above amount shown to be in her hands belongs in equal parts to each of the five heirs, and that at their request it has been by her invested in land, as in that way it goes farther toward making a living for them.' "

The Court stated, page 470, that by this declaration the guardian

> "used words sufficient to raise a trust and she designated certainly the objects of the trust. There is, however, no definite subject. She states, generally, that the money of her wards was at their request invested in land. The land is not described particularly by technical terms or in any general manner that would serve to locate it. The subject of the trust not being described or in any way identified, it follows that an express trust was not created."

The Court held, however, that the facts alleged were sufficient to raise a resulting trust. The difference between

the instant case and *Snyder* v. *Snyder* (280 Ill. 467; 117 N. E. 465) is manifest. Here we have assignments to separate trusts of undivided interests in an identified fund. In *Snyder* v. *Snyder* the real estate which formed the whole subject of the single trust there under consideration was so inadequately described that it could not be identified by a reading of the documents. Nevertheless the Court there held that there was a *resulting* trust. That is the only authority cited directly in this connection in the opinion.

The only other Illinois case mentioned in the opinion is *Marble* v. *Marble,* 304 Ill. 229 (136 N. E. 589). That case contains a general statement that to create a trust the declaration must make reasonably certain its material terms, which must include the subject matter or property concerned, the beneficiaries, nature and quantity of interest they are to have, and the manner in which the trust is to be performed. The Court finds that the trust instrument was entirely lacking in a description of the subject matter of the trust. The opinion on this point states, pages 235-236:

> "* * * The only words which can be taken to be descriptive of the subject matter of the trust are the words 'the family estate,' into which the claim of appellant is stated to be entered at full value. There is no evidence of what the family estate consisted or that there was any family estate. There is no evidence of what property Mattie M. Marble was possessed at the date of the instrument. * * * Whatever she had, so far as the evidence shows, was her own property, acquired and paid for by her own means, not subject to any trust, not a part of any family estate, and the instrument does not purport to devote her property, or any particular part of it, to a trust in favor of her brother and his wife or 'the family' or any other beneficiary. If any estate was held in trust by her in her lifetime and managed by her as trustee the evidence does not show it.
>
> The words 'family estate,' without a context, are without meaning. * * *"

Obviously such a decision is no authority whatever for the particular proposition relied upon in the instant case.

Although there is no decision in the State of Illinois specifically passing on the precise point at issue, the Supreme Court of that State has recognized that there may be a resulting trust in a *part interest* in land. *Cook* v. *Patrick*, 135 Ill. 499, at 508 (26 N. E. 658). The Court has also repeatedly recognized the general rule that *any* right or interest may form the corpus of a trust estate. In *Burke* v. *Burke*, 259 Ill. 262 (102 N. E. 293) the Court said, page 268:

> "• • • In general, any right, interest or thing which may be the subject of property may be granted in trust. Every kind of vested right which the law recognizes as valuable may be transferred in trust. • • •"

In *Gurnett* v. *Mutual Life Ins. Co.*, 356 Ill. 612 (191 N. E. 250) the Court said, page 617:

> "A trust is an obligation arising out of a confidence reposed in a person, for the benefit of another, to apply property faithfully and according to such confidence. • • • It may be created in any property, real or personal, legal or equitable, which is in existence, and which in the eye of a court of equity, is of value. • • • Choses in action, contingent interests and expectancies may be assigned and a valid trust created in them. • • •"

See also Perry on Trusts, 7th Ed. Vol. I, Sec. 67, for a statement of the general rule.

The following New York decisions likewise state the law:

> "The fact that the trusts were to be kept in one fund does not necessarily create one trust." *In re Colgrove's Estate*, 221 N. Y. 455, at 459 (117 N. E. 813, 814).
>
> "Under the will the trustees took the legal title to the residuary estate, upon separate and several trusts, in favor of each of the nine grandchildren • • •. The trusts are not, it is true, separately framed, but the interests of the beneficiaries being given in shares,

the separable and distinct character of the trust provision necessarily results." *Stevenson* v. *Lesley*, 70 N. Y. 512, 516.

"The pivotal question in this case is • • • whether the testator meant to create one trust, • • • or whether he intended to constitute five separate trusts • • •.

"• • • The fund was to be kept together without actual division • • •.

"• • • An undivided fourth was to be set apart for each grandchild • • •.

"In many cases where, as in this, income and principal were given in equal shares, although out of one fund kept *in solido* for convenience of investment, a severance of the trust into its component parts has been adjudged. *Savage* v. *Burnham*, 17 N. Y. 561; *Stevenson* v. *Lesley*, 70 N. Y. 512; *In re Verplanck*, 91 N. Y. 443. The shares and interests are several, although the fund remains undivided." *Vanderpoel* v. *Loew*, 112 N. Y. 167, 177, 179, 180, 19 N. E. 481, 482, 483, 484.

Section 73 of Tentative Draft No. 1 of the Restatement of the Law of Trusts made by the American Law Institute, under the heading "Indefinite Interest in Definite Subject Matter," has the following comment (p. 136):

"a. An interest in a thing may be held in trust although it is not the complete property in the thing. It may be an estate for life or years, an undivided fractional interest or an interest up to or an interest above a certain stated amount."

Two of the illustrations given by the American Law Institute under this comment are as follows (P. 137):

"A and B are tenants in common of Blackacre. A declares himself trustee of his interest for C. A trust is created.

A, the owner of a claim for $1000, for value makes a partial assignment of the claim to the amount of $600 to B. B may effectively declare himself trustee of his interest. A may effectively declare himself trustee of his interest."

In Bogert, Trusts and Trustees (1935), Vol. 1, Section

111, pages 351, 352, after stating the general rule that a trust may fail for vagueness or indefiniteness, the author says:

> "There is no indefiniteness when the *res* is a certain share in a particular thing or in a group of things. Thus, an undivided interest in a vessel may be the subject of a trust, (*Starbuck* v. *Farmers' Loan & Trust Co.*, 51 N. Y. S. 58, 28 App. Div. 272) as well as a fractional interest in a lot of securities. (*Bay Biscayne Co.* v. *Baile*, 75 So. 860, 73 Fla. 1120.) If the settlor purports to make the subject of his trust an interest in certain specific things of a fungible nature, where each unit is like each other unit, but makes no separation of any particular things, and he owns a mass of things of that type, it is reasonable to give effect to his intent by treating a share in the mass as the trust *res. For example, if the owner of twenty thousand identical shares of stock in the same corporation purports to declare himself trustee of ten thousand shares of this stock for another, but fails to separate out any particular shares as the things to which the trust should attach, the intent of the settlor may be construed to be to make himself a trustee of a half interest in the entire group of shares.* (*Rollestone* v. *Nat. Bank of Commerce in St. Louis*, 252 S. W. 394, 299 Mo. 57.) A similar rule is applied in the case of the sale of fungible goods. (*Kimberly* v. *Patchin*, 19 N. Y. 330, 75 Am. Dec. 334.)" (Italics ours.)

The assets of the trust estates in the instant case were mainly corporate stocks with some cash and Government or Municipal bonds. (R. 138.) The Government's position, and the basis of the decision of the Circuit Court of Appeals, is that separate trusts were not created because there was no physical separation of the certificates of stock and cash as between the several trusts. What possible logic is there in this argument? A certificate of stock is itself merely evidence of an undivided interest in a corporation. The certificates of stock, except as evidence of such an interest, have no value in and of themselves. Each share of capital stock in a given corporation is precisely like

every other share, and whether the interests of a trustee and of the beneficiaries of a trust are represented by a stock certificate or by any other records showing the undivided interests of the trustee in the corporation are, we submit, without any fundamental significance. This very question was raised in the case of *Rollestone* v. *National Bank of Commerce,* 299 Mo. 57 (252 S. W. 394). The Court said, page 71:

> "It is next contended that, as the evidence does not show that any particular portion of the stock was set apart for Rollestone and a certificate issued therefor, the alleged trust must fail for lack of a definitely ascertained subject. But it clearly appears from Milliken's statements that he was carrying Rollestone for 10,000 shares of the capital stock of the Golden Cycle Mining Company. Now Milliken at that time had more than 1,000,000 shares standing in his name on the corporation's books, all of which were exactly alike in kind and value. There was no earmark by which any one of them could be distinguished from the others, so as to give it additional value or importance. They were like grain of a uniform quality, wherein one bushel is of the same kind and value as another. *Caswell* v. *Putnam,* 120 N. Y. 153, 157, 24 N. E. 287. The words '10,000 shares of capital stock' embodied, therefore, an accurate description of definite property rights in the corporation. A certificate of the same number of shares would have evidenced nothing more. *Richardson* v. *Shaw,* 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Case. 981. Appellants' contention under this head is disallowed."

Conclusion.

In this case the Circuit Court of Appeals of the Second Circuit has rendered a decision on an important question of local and general law in conflict not only with the principle laid down in the decisions of the State of Illinois but also in conflict with authority generally. The decision is untenable as a matter of logic and is contrary to rules of

law on which the practice among trustees throughout the country is based.

It cannot be said that only the facts in this case are involved. If the Court is wrong in holding that an undivided interest in property is too indefinite to constitute the corpus of a separate trust, then there is nothing in the facts to justify the decision. The decision therefore is based on a principle, specifically laid down by the Court, which is of general and widespread application, and which is indefensible from the standpoint of authority or of logic.

Commissioner of Internal Revenue v. *William B. McIlvaine and John P. Wilson, Jr., Trustees under Deed of Trust of John P. Wilson* (29 B. T. A. 304), involving precisely the same principle, is now pending before the Circuit Court of Appeals of the Seventh Circuit.

It is therefore respectfully submitted that the instant case is one calling for the exercise by this Court of its supervisory powers in order that the fundamental error in the decision of the Circuit Court of Appeals of the Second Circuit may be corrected and the confusion avoided which would result were the decision allowed to stand. To this end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals of the Second Circuit and finally reverse it.

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